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Voluntary Handicapps-Should Drug Abuse, Alcoholism and Obesity be Protected by Pennsylvania's Anti-Discrimination Laws?

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I. Introduction

Joyce English is 5'8" tall and weighs 341 pounds.[1] She is presently unemployed.[2] On April 26, 1977, Ms. English applied for a job as a customer service clerk at the Philadelphia Electric Company and passed all the pre-employment criteria but one: weight. Ms. English is more than twice her "desirable weight" as defined by the Metropolitan Life Insurance Company tables.[3] Philadelphia Electric's employment standards routinely require the rejection of such applicants.[4]

On May 4, 1977 Ms. English sought relief before the Pennsylvania Human Relations Commission (PHRC)[5] from discrimination on the basis of her handicap, obesity. The Commission determined that "[S]he is entitled to be offered the next available position as customer service clerk with [Philadelphia Electric], and to receive back pay with interest."[6] The Commission's decision is pres-

1. English v. Philadelphia Elec. Co., No. E-12163, op. at 3 (Pa. Human Rel. Comm'n. March 31, 1980).

2. Brief for Respondent at 53, Philadelphia Elec. Co. v. Pa. Human Rel. Comm'n. (English), No. 1033 C.D. 1980 (Pa. Commw. Ct., petition for review filed April 25, 1980). The brief holds that Ms. English "left Philadelphia because she could not find work and could barely survive and provide for her son on welfare . . . . [S]he was forced to return to Pensacola, Florida, where most of her family resides . . . [and] sought to mitigate damages by diligently seeking employment." *Id.*

3. Although these tables are widely used by insurers, several authorities have questioned the scientific validity of the methods employed and categories used in these tables. The main contention is that weight and height alone are insufficient to define obesity. *See* J. MAYER, OVERWEIGHT: CAUSES, COSTS AND CONTROL 28-44 (1963).

4. It was Philadelphia Electric's policy not to hire anyone more than forty pounds overweight. Although the policy was not rigidly enforced, it was applied as a matter of general policy. English v. Philadelphia Elec. Co., No. E-12163, op. at 9 (Pa. Human Rel. Comm'n March 31, 1980).

5. The Pennsylvania Human Relations Commission is the agency charged with enforcement of the Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, §§ 951-962 (Purdon 1964 & Supp. 1980-81).

6. English v. Philadelphia Elec. Co., No. E-12163, op. at 20 (Pa. Human Rel. Comm'n March 31, 1980).

ently on appeal before the Commonwealth Court of Pennsylvania.[7]

The *English*[8] case presents the first opportunity for Pennsylvania courts to address the protection afforded handicapped individuals by the Pennsylvania Human Relations Act (PHRA).[9] The issues inherent in *English* require not only that a definition of handicapped be determined, a decision affecting thousands of Pennsylvania workers[10] and employers,[11] but that the definition be forged within the context of the highly controversial question[12] that arguably voluntary[13] conditions, such as alcoholism, obesity and drug abuse are to be protected as handicaps.

II. Defining the Questions

In considering the inclusion of a (given) condition within the protection of an anti-discrimination law, a court undertakes two conceptually distinct analyses. First a legal meaning is ascribed to "handicapped," then and only then, does the court determine that the particular condition merits classification as a handicap. Each question has its own imperatives.

For example, the courts of Wisconsin[14] and Illinois[15] have ascribed legal meaning to the word handicap for the purpose of anti-discrimination law.[16] Both courts purported to adopt the "ordinary

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7. Philadelphia Elec. Co. v. Pa. Human Rel. Comm'n. (English), No. 1033 C.D. 1980 (Pa. Commw. Ct., petition for review filed April 25, 1980).

8. *Id.*

9. Passed in 1955, the Pennsylvania Human Relations Act prohibits discrimination in housing, employment and public accommodations. Its protections extend to racial, gender, religious and national origin classifications as well as the handicapped. The extension of the PHRA to "handicapped" individuals, PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1980-81) is the first instance in which the class protected by the Act is not clearly defined. Thus, the scope of the definition given to the terms will define the scope of the jurisdictional coverage granted under the Act.

10. *See,* U.S. DEPT. OF H.E.W., PEOPLE POWER: REPORT ON THE NATIONAL CONFERENCE ON REHABILITATION OF THE DISABLED AND DISADVANTAGED, 124-133 (1969).

11. The original Pa. Human Relations Act, covered only employers employing twelve or more persons, but the Legislature significantly expanded the coverage by including employers with only four or more employees. PA. STAT. ANN. tit. 43, § 954(b) (Purdon 1964) (amended by Act of Jan. 24, 1966, Pa. Law 1525, § 1).

12. *See Fat People Fight Back Against Bias,* U.S. NEWS & WORLD REP., September 29, 1980 at 69-70.

13. The dictionary defines voluntary as "brought about of one's own accord or by free choice," RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1601 (1979). This comment classifies obesity and alcohol and drug use as voluntary because arguably, they are "brought about by free choice."

14. *See* Chicago, M., St. P. & P.R.R. v. Wisconsin Dept. of Labor, Indus. & Human Rel., 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

15. *See* Advocates for the Handicapped v. Sears, Roebuck & Co., 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), *cert. denied,* 444 U.S. 981 (1979).

16. Wisconsin's fair employment statute defines the handicap class by stating: "It is discrimination because of a handicap for an employer to refuse to employ . . . terminate from employment . . . discriminate against any individual . . . unless such handicap is reasonably related to the individual's ability to undertake the job-related responsibilities of that individual's employment." WIS. STAT. ANN. § 111.32(5)(f). The closest the Illinois Legislature came to defining handicap is (West Supp. 1980-81) a "handicap [is] unrelated to one's ability to

meaning"[17] or "common usage,"[18] of handicapped,[19] yet each reached a very different understanding of the term.

In *Chicago, Milwaukee, St. Paul and Pacific Railroad v. Wisconsin, Department of Labor, Industry & Human Relations,*[20] the Wisconsin Supreme Court defined a handicap as "a disadvantage that makes achievement unusually difficult."[21] The court determined that the purpose of Wisconsin's Fair Employment Law was to "foster the employment of all properly qualified individuals," consequently restricting an employer's right to "[d]iscriminate against those who, though female, old, handicapped or whatever, can function efficiently on the job."[22] Only after it arrived at an inclusive definition, did the court determine asthma to be a handicap.[23]

The Illinois Appeals Court, on the other hand, took a far more restrictive view of the handicapped class. In *Advocates for the Handicapped v. Sears, Roebuck and Co.,*[24] it held the common meaning of handicap to be a "physical or mental condition that is *generally believed* to impose *severe* barriers upon the ability of an individual to perform major life functions."[25] The Illinois decision expressly rejected the definition adopted in Wisconsin. Under the *Sears* court's understanding of the Wisconsin formulation, in order for "any physical condition to reach the level of a handicap protected by the Act,

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perform jobs or positions available to him for hire or promotion. . . ." ILL. CONST. art. I, § 19. These statutes define handicap in terms of job relatedness rather than physical characteristics.

In Pennsylvania, the legal definition of handicapped will be formulated by the courts as the legislative definition merely states "a 'non-job related handicap' means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of employment. . . ." PA. STAT. ANN. tit. 43, § 954(p) (Purdon Supp. 1980-81). The definition offers guidance as to when a handicap is job-related, but leaves to the judiciary the decision if the handicapped class is to be limited by any other criteria.

17. Advocates for the Handicapped v. Sears, Roebuck & Co., 67 Ill. App. 3d 512, 515, 385 N.E.2d 39, 43 (1978), *cert. denied,* 444 U.S. 981 (1979).

18. Chicago, M., St. P. & P.R.R. v. Wisconsin Dept. of Labor, Indus. & Human Rel., 62 Wis. 2d 392, 398, 215 N.W.2d 443, 446 (1974).

19. This reflects a long standing rule of statutory construction typified by 1 PA. CONS. STAT. ANN. § 1903(a) (Purdon Supp. 1980-81): "Words and phrases shall be construed . . . according to their common and approved usage. . . ." *Id.* Handicap's entymology shows that it came into common usage only 1880. Handicap originated in horse racing, where weights were added to impede the performance of a superior horse. FOWLER'S MODERN ENLISH USAGE 238 (2d ed. 1965).

It appears that the common usage of handicap refers to some impediment to performance, but the degree and nature of the impediment necessary to create a handicap is not a matter of common understanding. (Certainly the highly speculative nature of "handicapping" at the race track points this out.) The "common usage" rule of construction does not provide a meaning for handicap in the abstract and therefore offers little aid in giving legal content to "handicap" for the purposes of fair employment law.

20. 67 Wis. 2d 392, 215 N.W.2d 443 (1974).

21. *Id.* at 398, 215 N.W.2d at 446 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1027 (Unabr. 1961)).

22. *Id.* at 397, 215 N.W.2d at 445.

23. *Id.* at 398, 215 N.W.2d at 446.

24. 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), *cert. denied,* 444 U.S. 981 (1979).

25. *Id.* at 517, 385 N.E.2d at 43 (emphasis added).

an employer need only act upon that condition and deny the individual employment."[26] To the Illinois court, then, the Wisconsin opinion's focus on the *employer's* failure to consider the employee's merit, rather than on the nature and severity of the *employee's objective physical impairments*, had the effect of "transforming the Act[27] into a universal anti-discrimination law,"[28] a result clearly outside the Legislature's intent.

Both courts arrive at a definition through an interpretation of the applicable fair employment statute. Clearly, the basic issue in the opinions is the intended purpose and effect of the statutes, not the "common" understanding of who is handicapped. The other jurisdictions that have defined handicapped for the purposes of anti-discrimination laws parallel either the Wisconsin position, that the anti-discrimination statutes underlying policy of merit selection requires an inclusive definition,[29] or the Illinois position, that a restrictive definition is necessary to avoid universally accessible fair employment protections.[30] This comment will, therefore, examine which position most comports with values underlying the Pennsylvania Human Relations Act by analyzing the Act's history, language, and past judicial interpretation.[31]

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26. *Id.* at 516, 385 N.E.2d at 43.

27. Equal Opportunities for the Handicapped Act, ILL. STAT. ANN. ch. 48, § 851 (Smith-Hurd Supp. 1980-81).

28. Advocates for the Handicapped v. Sears, Roebuck & Co., 67 Ill. App. 3d 512, 516, 385 N.E.2d 39, 43 (1978), *cert. denied,* 444 U.S. 981 (1979).

29. *See* Matter of State Division of Human Rights v. Averill Park Cent. School Dist., 46 N.Y.2d 950, 388 N.E.2d 729, 415 N.Y.S.2d 405 (1979) (mistaken classification of an individual as partially deaf deemed a handicap). Chicago, M., St. P. & P.R.R. v. Washington State Human Rights Comm'n, 87 Wash. 2d 802, 557 P.2d 307 (1976) (individual suffering from slight impairment of knees due to surgery deemed to be handicapped).

30. A clearer example of the type of reasoning that leads to a restrictive definition of handicap can be found in Providence Journal Co. v. Mason, 116 R.I. 614, 359 A.2d 682 (1976). In deciding whether an individual who suffered from a whiplash injury that resulted in minor paralysis and required the use of a neck collar was covered by the R.I. Fair Employment Practices Act, (R.I. GEN. LAWS §§ 25-5-1 to 39 (1968)) the court determined that even under an explicit statutory definition that "A 'physical handicap' means any physical disability, malformation, or disfigurement which is caused by bodily injury . . . and which shall include, but not be limited to any degree of paralysis . . . lack of coordination, . . . or physical reliance on . . . [a] remedial appliance or device," R.I. GEN. LAWS § 28-5-6(H) (Supp. 1978), the individual was *not* handicapped.

Acknowledging that the plaintiff suffered some paralysis and wore a remedial device, the court reasoned that literal application of the statutory definition would result in protecting all injuries, effectively expanding coverage beyond the limits which could be attributed to reasonable legislators. In *Mason,* the court's *perception of purpose, overrode even the literal words of the statute.* The definition of handicap, then, turns on statutory policy, not on statutory language. *See also* Burgess v. Jos. Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979) (incipient glaucoma not a handicap).

31. This approach follows the requirements of the construction rules codified at 1 PA. CONS. STAT. ANN. § 1921 (Purdon Supp. 1980-81):

> When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering among other matters:
> (1) The occasion and necessity of the statute;
> (2) The circumstances under which it was enacted;
> (3) The mischief to be remedied;

Defining handicapped, even inclusively, does not, however, necessarily mean that obesity, alcoholism, or drug abuse are within the stated formula. The fact that such conditions are arguably voluntary involves considerations distinct from the question of what is the actual degree of impairment intended to be protected by a given fair employment statute.[32] It is the cause, rather than the severity at issue. Nonetheless, the mere fact that an action is a matter of free choice is in itself meaningless. The legal effect of a volitional act stems less from the character of the action than from the legal context in which the act is performed.[33] Moreover, the value society places in preserving a particular choice may have legal significance.

For example, choice of one's religion is a voluntary act, yet its protection by anti-discrimination laws is unquestioned.[34] Drug abuse, alcoholism, and obesity on the other hand are arguably less volitional than religious preference,[35] yet strenuous objections are raised to their protection by the same laws.[36] The distinction does not flow from the voluntary nature of the acts, but from the moral distaste society has for overindulgence in food, drugs or alcohol as compared to the fundamental value society places on religious choice. The classification of voluntary conditions as handicaps, therefore, requires an understanding of society's moral evaluation of the interests being promoted or discouraged. The crucial issue then, is whether societal condemnation of overindulgence in food, alcohol, or drugs outweighs societal interests in a non-discriminatory work-

(4) The object to be attained;
(5) The former law, if any, including other statutes upon the same or similar subjects;
(6) The consequences of a particular interpretation;
(7) The contemporaneous legislative history;
(8) Legislative and administrative interpretations of such statutes.

32. Even though the Wisconsin Dept. of Labor, Industry and Human Relations utilized the inclusive definition of handicapped formulated in Chicago, M., St. P. & P.R.R. v. Wisconsin Dept. of Labor, Indus., and Human Rel., 62 Wis. 2d 392, 215 N.W.2d 443 (1974) the Department held that obesity was not a handicap, although it reserved the right to include other voluntary conditions within the statute's protection. *See* Plizka v. A.O. Smith Corp., No. -. (Wis. Dept. of Indus. Labor & Human Rel. Aug. 19, 1975). This decision illustrates that it is logically consistent to take an inclusive view of the handicap class, but consider voluntariness to be a factor that may exclude a given condition from the broadly defined class. The importance of understanding that conceptually discrete issues are involved in voluntary handicaps cannot be overemphasized. Formulating a restrictive definition *solely* because the complainant is obese would do a disservice to others whose conditions may not bear the stigma of assumed volition. The effects of voluntariness under an inclusive definition are discussed in the text accompanying notes 161-171 *infra.*

33. *See* S. PUFFENDORF, ELEMENTORUM JURIS PRUDENTIAE UNIVERSALIS LIBRI DUE 265-280 (1672).

34. *See* Fagan v. National Cash Register Co., 481 F.2d 1115, 1135 n.22 (D.C. Cir. 1973) (discussing the basis for inclusion of religion within the coverage of the Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e (1976).

From its inception, the Pennsylvania Human Relations Act has afforded protection from discrimination on the basis of religious creed. PA. STAT. ANN. tit. 43, § 955 (Purdon 1964).

35. *See* notes 168 and 169 and accompanying text *infra* (discussing the validity of the presumption of free choice in obesity, alcoholism and drug abuse).

36. Ogden, *Justice and the Problem of the Volitional Victim,* 28 LAB. L.J. 417 (1977).

place.[37] This comment will offer an analysis of how condemnation of the voluntary conditions have been balanced against other societal interests in related areas of the law.

III. Related Areas of the Law: Purpose, Definitions and Volition

The terms handicap and disability evoke a continuum of meanings as the concepts move across the legal landscape. For example, in a Pennsylvania law that provides an exclusive fishing area for the handicapped,[38] the definition of handicapped includes only individuals whose mobility is severely impaired.[39] The definition does not extend coverage to many individuals ordinarily considered handicapped. Yet precisely because it outlines only impairments that severely restrict access to fishing areas, this narrow definition is perfectly consistent with the general purpose of the fishing laws that all persons have equal access to wild animals under public protection.[40]

At the other end of the continuum, Pennsylvania statutes regulating elections permit a qualified voter who is physically disabled to request assistance when voting. A voter may declare himself disabled by so stating under oath and by having the nature of the disability recorded.[41] This broad definition of disabled serves the legislative purpose of maximizing individual access to the polls, while providing a means to protect against fraud. The following discussion aims to identify the PHRA's location within the continuum, as well as examine the treatment afforded alcoholism, obesity, and drug abuse in areas of the law in which case law on the handicap class has been developed.[42]

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37. The proposition that finding an act to be a matter of free choice will have legal consequences is at least as old as Justinian. "*In maleficiis voluntas spectatur, non exitus*" (In evil deeds regards must be to the intention and not to the result.) DIG. 48, 8, 14. The law, however, has progressed to the point where the legal consequences for an act determined to be voluntary need not be punishment in every legal context. *See* DEL VECCHIO, PHILOSOPHY OF THE LAW, 257 (8th ed. 1954). *See also* note 169 and accompanying text *infra.*

38. PA. STAT. ANN. tit. 30, § 252.1 (Purdon Supp. 1980-81).

39. Disabled person as used in this section means any person who is suffering from paraplegia and has permanent paralysis of both legs and lower parts of the body or is suffering from hemi-plegia . . . resulting from traumatic injury to spinal chord or brain, or has suffered amputation of both feet or one foot.

PA. STAT. ANN. tit. 30, § 252.1(a) (Purdon Supp. 1980-81).

40. 38 C.J.S. *Game* §§ 5, 7 (1943 & Supp. 1980).

41. PA. STAT. ANN. tit. 25, § 3058 (Purdon 1963).

42. For definitions of disability in other, less related, areas of the law, see 51 PA. CONS. STAT. ANN. § 6037 (Purdon 1976) (disability in the military crime of maligering); PA. STAT. ANN. tit. 40, § 1008.3 (Purdon Supp. 1980-81) (denial of auto insurance because of a disability); PA. STAT. ANN. tit. 63, § 390-5 (Purdon 1963) (disabilities effecting the licensing of pharmacists).

A. *Workmen's Compensation*

The basic purpose of Workmen's Compensation[43] is to shift the burden of occupational injuries from the individual employee to the employer, who in turn shifts the burden to the marketplace by adding the cost of compensation to the product.[44] The employer is strictly liable for all injuries arising in the course of employment,[45] but the amount of compensation to the employee is statutorily defined.[46]

Consistent with the remedial purpose, disability is defined as "the loss of earning power as the result of an injury."[47] Thus, disability is a flexible concept used only to measure the degree of injury in order to determine the appropriate amount of compensation. A physical condition is considered a disability because of its effect on the ability to perform, not because of its inherent nature.[48] The use of the term disability in the workmen's compensation context undermines an assumption that the legislature has mandated that handicap be limited *only* to certain *physical* characteristics, rather than the inability to perform under fair employment law.[49]

Workmen's compensation considers "voluntary" conditions in the context of two doctrines found in tort law: assumption of the risk[50] and pre-existing conditions.[51] The Pennsylvania Workmen's Compensation statute specifically eliminates the defense of assumption of the risk. Benefits are denied, however, if the injury is self-inflicted.[52] The legislature determined that even when an individual *voluntarily* and unreasonably places himself in a position of danger, he should not have to suffer the burden of a resultant injury without compensation.

The Commonwealth Court of Pennsylvania applied this policy

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43. PA. STAT. ANN. tit. 77, §§ 1-1603 (Purdon 1952 & Supp. 1980-81).

44. "The cost of the product should bear the blood of the workman." W. PROSSER, LAW OF TORTS, 530 (4th ed. 1977). *See also* L. KNOLL, *Forward to Title 77* in 77 PURDON'S PENNSYLVANIA STATUTES ANNOTATED ix (1952).

45. PA. STAT. ANN. tit. 77, § 431 (Purdon 1952).

46. PA. STAT. ANN. tit. 77, §§ 501-582 (Purdon 1952) (rules governing the amount of the compensation award).

47. Keiser v. Philadelphia & Reading Coal & Iron Co., 134 Pa. Super. Ct. 104, 105, 4 A.2d 188, 189 (1939). There is no statutory definition of disability despite the fact that the law contains a compensation schedule for total disabilities, PA. STAT. ANN. tit. 77, § 511 (Purdon Supp. 1980-81) and a separate schedule for partial disability, PA. STAT. ANN. tit. 77, § 512 (Purdon Supp. 1980-81).

48. "The indemnity is based on disability to work, not on the physical injury as such." 99 C.J.S. *Workmen's Compensation* § 296 at 1035 (1958).

49. This is the assumption underlying the narrow definition found in Advocates for the Handicapped v. Sears, Roebuck & Co., 67 Ill. 3d 512, 385 N.E.2d 39 (1978), *cert. denied,* 444 U.S. 981 (1979). *See* notes 24-30 and accompanying text *supra.*

50. W. PROSSER, LAWS OF TORTS 525 (4th ed. 1977).

51. *Id.* at 262.

52. PA. STAT. ANN. tit. 77, § 431 (Purdon Supp. 1980-81).

to alcohol abuse in *Fink v. Workmen's Compensation Board.*[53] In awarding compensation to the survivors of a drowned swimming pool worker proven to have been intoxicated at the time of the accident, the court held:

> Section 201 of the Act, 77 P.S. § 41 specifically prohibits an employee from collecting damages from his employer in an action at law if the employer . . . demonstrates that the employee's injury was caused by his intoxication. We are in this case dealing with a *compensation* claim, however and not an action at law. . . . Section 301(a) of the Act, 77 P.S. § 43 only prohibits compensation . . . if the injury is self-inflicted . . . there is no evidence that drowning was self-inflicted.[54]

Thus, intoxication was not seen as being a matter of free choice to the extent that it caused a self-inflicted injury.

The same result ensues when the employer uses a defense of pre-existing conditions. Risks personal to the employee are not compensable unless the conditions of employment are shown to aggravate, accelerate or combine with the pre-existing conditions to cause death or disability.[55] In *Mississippi Association of Insurance Agents v. Seay,*[56] the employer provided uncontroverted proof that the employee was obese and a heavy drinker and smoker.[57] The employer contended that these voluntarily assumed conditions were sufficient to cut off his liability for a heart attack that occurred during the course of the employee's employment. By rejecting this reasoning, the court implicitly found that when the conditions of employment are a substantial cause of the injury, the underlying legislative intent to compensate such injuries renders the voluntariness of pre-existing conditions legally insignificant.[58]

Fink and *Seay* illustrate that state legislatures may be willing to shift the burden of the voluntary conditions of an individual employee to the employer, when the social policy so mandates. Having shifted the burden to employers in the injury context, one could reasonably expect a similar shift of burden in the hiring context.[59]

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53. 37 Pa. Commw. Ct. 67, 388 A.2d 1152 (1978).

54. *Id.* at 69, 388 A.2d at 2253 (emphasis added). The *Fink* court found that although intoxication at the time of injury was sufficient at law for the individual to bear the consequences of the injury, the overriding purpose of Workmen's Compensation, that the burden of injuries be shifted to the employer, renders the voluntary nature of the intoxication irrelevant.

55. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 12.20 (1980).

56. 218 So. 2d 413 (Miss. 1969).

57. *Id.* at 421.

58. While the court did not address the voluntary issue directly in its opinion, the fact situation, together with Justice Robertson's vigorous dissent lead to the conclusion that the court did consider and reject the voluntary argument. *Id.* at 418-28 (Roberts, J., dissenting).

59. For an in-depth analysis of the legal and social policy justification for shifting a greater burden to the employer, see Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal & State Employment Statutes & Arbitration Decision,* 53 ST. JOHN'S L. REV. 659 (1979).

B. *Social Security Disability Benefits*

The definition of disability under the insurance provisions of the Social Security Act[60] rests on three criteria: (1) a medically determinable physical or mental impairment; (2) the impairment has continued or can be expected to continue for a period of at least twelve months; and (3) the impairment creates an inability to engage in any substantially gainful activity.[61] This definition is restrictive and has been applied in a restrictive manner by the Social Security Administration.[62] Eligibility for benefits is limited by regulations that require a high degree of medical proof.[63] In addition, "any substantially gainful activity"[64] has been construed broadly. Finally, the gainful activity need not be available in an area proximate to the claimant, but may merely "exist in the *national* economy."[65] The definition limits eligibility because the purpose of Social Security is to provide income maintenance only to those who are excluded from the economy because of age or physical condition.[66] Although the system is designed to provide incapacitated individuals with "a right to share in consumption when not working," it does not lose sight of the fact that "a job is the most important part of income security."[67] By closely associating disability with the ability to work, the definition implements the social policy of maintaining those who are incapable of work, while providing incentive to work to those with the capacity.

Within this narrowly drafted definition, the treatment afforded obesity, alcoholism,[68] and drug addiction is somewhat unexpected. For example, while acknowledging that alcoholism could render an

60. Social Security Act of 1935, tit. II, codified at 42 U.S.C. §§ 401-418, 420-423, 424a-431 (1976).

61. 42 U.S.C. § 423(d)(1)(A) (1976).

62. The statute further defines physical or mental impairments as "[A]n impairment that results from anatomical, physiological or psychological conditions which are demonstrable by medically acceptable clinical and laboratory techniques," 42 U.S.C. § 423(d)(3) (1976). Further, 20 C.F.R. § 404.1526 (1980) states that the conclusion of non-social security administration physician is not determinative and must be supported by "specific and complete clinical findings." *Id.*

63. *See* 20 C.F.R. §§ 404.1504, 404.1513, 404.1516, 404.1524-.1527, app. I at 356 (1980) (standards for medical determination of disability).

64. *See* 20 C.F.R. §§ 404.1505-.1508, 404.1510-.1513 (1980) (methods of assessing an applicant's vocational possibilities in the job market).

65. 42 U.S.C. § 423(d)(2)(A) (1976) (emphasis added.) The regulations add that even if the individual cannot find work because of employer's hiring practices, he cannot receive benefits, if he is capable of working at all. 20 C.F.R. § 404.1509(b) (1980). Thus, if disability had the same definition under fair employment laws, not only would the individual be ineligible for Social Security benefits, he would also not be protected from the very hiring practices that made him so unemployable that he requires some form of income maintenance.

66. *See* R. BALL, SOCIAL SECURITY TODAY AND TOMORROW 3 (1978) (author is a former Commissioner of the Social Security Administration.)

67. *Id.*

68. *See* Annot., 39 A.L.R. FED. 182 (1978) (discussing alcoholism under disability insurance law, 42 U.S.C. § 423 (1976).

individual incapable of working, one early decision[69] denied benefits by presuming that the failure to abstain from liquor was a voluntary failure to follow treatment.[70] Another early decision granted benefits where the physical manifestations of the alcoholism, but not the alcoholism itself, became irreversible.[71] The modern view however is that when the condition has so advanced that the individual cannot work, both the condition itself and the failure to abstain are presumed to be involuntary.[72] The modern result is, in fact, consistent with the underlying purpose of social security.[73] If the policy of social security is identifying and maintaining those physically incapable of working, then the cause of their incapacity should be irrelevant.

A similar analysis has been applied to obesity under the Social Security disability definition. The Court of Appeals for the Sixth Circuit[74] reasoned that "obesity is a consideration not for rejecting disability benefits, but in explaining why employment . . . is not available. While I agree no one should eat their way onto the Social Security rolls, such an object would hardly have led this applicant to carry 325 pounds into 30 inch coal mines for 25 years."[75] The Fifth Circuit,[76] addressing the same issue added, "[C]ommon sense and personal experience tells us how physically and emotionally difficult it is to maintain an exercise program and a daily diet of 1500 calories without medical supervision."[77] Both courts viewed massive obesity as an involuntary condition.

The alcoholism and obesity decisions do not signal an end to the voluntary/involuntary distinction. They indicate, instead, a willingness to accept a medical rather than a moral judgment of when an act is volitional[78]—a reasonable result in light of the perceived pur-

69. Osborne v. Cohen, 409 F.2d 39 (6th Cir. 1969).

70. The decision implemented a regulation that states "[one] . . . [w]ho will fully fail to follow . . . prescribed treatment, cannot by virtue of such failure, be found to be under a disability." 20 C.F.R. § 404.1518 (1980).

71. Lewis v. Celebrezze, 359 F.2d 398 (4th Cir. 1966) (irremedial liver damage found). Although strictly conforming to the failure-to-remedy regulation (see note 70 *supra*), this approach has the effect of encouraging alcoholism by denying benefits to all but those whose alcohol consumption has ravaged their bodies. If the overriding policy consideration is the discouragement of drinking, then no alcoholic should be allowed benefits. If the overriding policy is to provide maintenance for the disabled, then benefits should be allowed to any alcoholic incapable of working. The tying of benefits to actual physical damage may alleviate a problem of proof, but it neither discourages drinking nor provides treatment to the unfortunate individual.

72. *See* Adams v. Weinberger, 548 F.2d 239 (8th Cir. 1977).

73. The alcoholic must pass the same eligibility requirements as any other disabled individual. *See* notes 62-69 and accompanying text *supra*. The concern in this analysis is access of the class to the program, not inclusion of a particular individual within the designated class.

74. Mefford v. Gardner, 383 F.2d 748 (6th Cir. 1967).

75. *Id.* at 761.

76. Coulter v. Ingram Pipeline, Inc., 511 F.2d 735 (5th Cir. 1975).

77. *Id.* at 738.

78. "[If the alcoholism] progresses to the point where there is recognizable mental or

pose of Social Security. Whether the purpose of anti-discrimination laws requires adoption of the medical definition awaits further analysis, but in the Social Security context alcoholism and obesity are regarded as diseases to be treated, not vices to be punished.

C. *Vocational Rehabilitation*

1. Eligibility for Vocational Rehabilitation Programs.—Congress enacted the Vocational Rehabilitation Act of 1973[79] to enable handicapped individuals to live independently by becoming "completely integrated into normal community living and service patterns."[80] The law was spurred by an express finding that the benefits and fundamental rights of our society were often denied to the handicapped, such that the challenges and problems of their conditions fell primarily on the handicapped individual or his family.[81] To shift this burden Congress generously funded[82] state rehabilitation programs[83] assuring that the Vocational Rehabilitation Act would expand services at the local level. Individual eligibility for these programs[84] is determined by two criteria: first, the individual must have a "physical or mental disability which for that individual constitutes or results in a substantial handicap to employment";[85] and second, the individual "can reasonably be expected to benefit in terms of employability from vocation rehabilitation services."[86] In practice, the threshold for individual qualification is low[87] since the state, in every case, has the burden of stating

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physical deterioration, *moral* values should not prevent a finding of . . . disability." Wyper v. Providence Ins. Co., 533 F.2d 57, 61 (2d Cir. 1976) (applying Social Security definitions to private disability insurance) (emphasis added).

A medical definition of voluntary may be equated with the legal definition of voluntary only where the policies served by both are substantially similar. By adopting the medical standard for defining when a condition is voluntarily caused or maintained, the courts are implicitly stating that treatment of these conditions is of greater value to society than moral condemnation.

79. 29 U.S.C. §§ 701-794 (1976) as amended by Comprehensive Rehabilitation Service Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955.

80. 29 U.S.C. § 701 (1976).

81. White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, § 301, 88 Stat. 1631 (1974).

82. Congress has authorized appropriations totalling more than three billion dollars for rehabilitation services. Comprehensive Rehabilitation Service Amendments of 1978, Pub. L. No. 95-602, § 105(b), 92 Stat. 2955, amending 29 U.S.C. § 720 (1976).

83. An 80% federal contribution to state programs is authorized in 29 U.S.C. § 707 (1976).

84. State programs desiring federal funding are required to meet standards set by the Secretary of Health, Education and Welfare. 28 U.S.C. § 721 (1976).

85. Comprehensive Rehabilitation Services Amendments of 1978, Pub. L. No. 95-602, § 122, 92 Stat. 2955 (codified at 29 U.S.C.A. § 706 (7)(A)(i) (Supp. 1980)).

86. Comprehensive Rehabilitation Services Amendments of 1978, Pub, L. No. 95-602, § 122, 92 Stat. 2955 (codified at 29 U.S.C.A. § 706 (7)(A)(ii) (Supp. 1980)).

87. The Vocational Rehabilitation Act allows payment to the states for up to 18 months for the provision of services for the purpose of determining if an applicant is, in fact, a handicapped individual. 29 U.S.C. § 706(4)(G)(i) (1976).

> [the] reasons for an ineligibility determination [showing] that the preliminary diagnosis [of the condition] or evaluation of rehabilitation potential has demonstrated *beyond a reasonable doubt* [that the individual is incapable of benefitting from vocational rehabilitation].[88]

The purpose of the Vocational Rehabilitation Act is integration of the handicapped into society; the standards defining the group are inclusive. If the Pennsylvania Human Relations Act is also designed to achieve economic integration, then the term handicapped should be defined expansively in that context as well.[89]

Alcohol and drug rehabilitation programs[90] have been funded under the Federal Vocational Rehabilitation Act of 1973.[91] The Pennsylvania General Assembly allocates funds to the programs through the Governor's Council on Alcoholism and Drug Abuse.[92] The Pennsylvania statutory eligibility criteria[93] and the Council's administrative standards are as inclusive as the federal eligibility criteria[94] despite the supposed voluntary nature of the conditions. The federal government adopted a medical rather than moral definition in the context of Social Security law. The Pennsylvania Legislature has likewise accepted the medical standard by defining alcohol and drug dependency in a matter that promotes, rather than withholds, treatment.

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88. 29 U.S.C. § 722(c)(2) (1976) (emphasis added).

89. *See* notes 112-117 and accompanying text *infra* (integrating minorities as a basis for enactment of the PHRA).

90. Rehabilitation programs for the massively obese, however, have not been funded in Pennsylvania. The policy of the Pennsylvania Bureau of Vocational Rehabilitation is that while obesity may be a substantial handicap to employment, present medical treatment cannot be reasonably expected to benefit the afflicted individual. PA. BUREAU OF VOCATIONAL REHABILITATION, MANUAL OF PROCEDURES, *Disability Guidelines,* § 407.05 (1980). The absence of weight control programs suggests that obesity is distinguishable from alcoholism and drug abuse. The manner in which these conditions may be distinguished and the relevancy of that distinction to fair employment law will be discussed in detail in the text accompanying notes 169-172 *infra.*

91. 29 U.S.C. §§ 701-794 (1976) as amended by Comprehensive Rehabilitation Services Amendment of 1978, Pub. L. No. 95-602, 92 Stat. 2955.

92. PA. STAT. ANN. tit. 71, § 1690.103(a) (Purdon Supp. 1980-81). Pennsylvania has had alcoholic treatment programs since at least 1953; PA. STAT. ANN. tit. 50, § 2101 (Purdon 1969) (repealed 1972), and drug addiction treatment since at least 1952, PA. STAT. ANN. tit. 50, § 2062 (Purdon 1969) (repealed 1972).

93. To be eligible for treatment one must be:

> A person who is using a drug, controlled substance or alcohol and is in a state of *psychic* or physical dependence . . . characterized by . . . responses that include *a strong compulsion* to take drugs [or] alcohol on a continuous basis to explain its psychic effects.

PA. STAT. ANN. tit. 71, § 1690.102(b) (Purdon Supp. 1980-81 (emphasis added).

94. GOVERNOR'S COUNCIL ON ALCOHOL AND DRUG ABUSE, GENERAL STANDARDS FOR TREATMENT ACTIVITIES § 262.6 (1979) is similar to the individual plans required under the federal Vocational Rehabilitation Act, 29 U.S.C. § 722 (1976). These plans inherently eliminate stereotypical assumptions about alcoholics and drug abusers by making eligibility primarily a medical decision. *See* notes 85-88 and accompanying text *supra.*

2. Section 504:[95] *The Equal Employment Opportunity Provision of the Rehabilitation Act of 1973.*—The Rehabilitation Act of 1973 aims to restore the individual's ability to work so that he may be fully integrated into the economy.[96] Because Congress allocated enormous resources[97] to provide incapacitated individuals with the skills necessary to earn a living, it would have been illogical for Congress to allow an employer to arbitrarily deny rehabilitated individuals the opportunity to use those skills. Congress, therefore, incorporated an anti-discrimination provision into the Vocational Rehabilitation Act of 1973, Section 504.[98]

To effectuate the anti-discrimination protection provision of Section 504, Congress drafted a definition of handicapped that was even more inclusive than the already broad standard used to define eligibility for treatment.[99] Despite the expansive definition in Section 504, and the fact that alcohol and drug users were already eligible for rehabilitation treatment, coverage of these conditions under Section 504 was disputed.[100]

The first court[101] to address the issue concluded that a drug user in a methadone treatment program was within the handicap classification outlined under Section 504. The court held:

> The conclusion that Congress intended to include past drug users within the protection of the [Vocational Rehabilitation] Act is reasonable as matters of public policy. . . . It is not surprising that Congress would provide assistance for those who have overcome their addiction and give support and incentive to those who are attempting to overcome it. . . . I, therefore, conclude that persons with histories of drug use, including present participation in . . .

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95. Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 504, 87 Stat. 355 (codified as 29 U.S.C. § 794 (1976)).

96. *See* note 81 *supra.*

97. *See* note 82 *supra.*

98. No otherwise qualified handicapped individual within the United States as defined in Section 706 [29 U.S.C. § 706 (b)] shall, solely, by reason of his handicap be excluded from . . . or be subjected to discrimination under any program or activity receiving Federal Financial Assistance.

29 U.S.C. § 794 (1976). While this section does not explicitly operate against employment discrimination, nor authorize a private action for its violation, it has been construed as authorizing both. *See* 44 A.L.R. FED. 149 (1979).

99. 29 U.S.C. § 706(6) (1976) states:

> For the purposes of Title V [including Section 504] . . . [a handicapped individual] means any person who has (A) a physical or mental impairment that substantially limits one or more major life functions, (B) Has a record of such impairments or (C) is regarded as having such impairments.

This is more expansive than the handicapped definition used to determine treatment eligibility because it not only encompasses those who presently have an impairment, but also those having had an impairment or are merely perceived as having an impairment. *See* notes 87-88 *supra. See also* notes 132-146 and accompanying text *infra,* for a detailed analysis of the consequences of this definition.

100. *See* Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal & State Employment Statutes & Arbitration Decisions,* 53 ST. JOHN'S L. REV. 659, 670 n.38 (1979).

101. Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978).

programs are handicapped within the meaning of the statutory and regulatory language.[102]

In 1978 Congress affirmed the court's decision when it amended the Vocational Rehabilitation Act to read: "For the purposes of Section 504 [29 U.S.C. § 794] as such sections relate to employment, such term [handicapped] does not include any individual whose *current use* [of drugs or alcohol] . . . prevents such individual from performing the duties of the job in question . . . or constitute[s] a direct threat to property or the safety of others."[103] Although ambiguous on its face, the legislative history of the amendment indicates that Section 504 coverage extends to *all* alcohol and drug abusers, except those who are, in fact, unable to perform job requirements.[104]

Section 504 is the federal analog to the Pennsylvania Human Relations handicap coverage.[105] Pennsylvania legislators were aware when they amended the Human Relations Act to include the handicapped that Section 504 applied to federal-state joint programs under the Vocational Rehabilitation Act.[106] Unless the policy of the Human Relations Act differs significantly from that of the federal Vocational Rehabilitation Act, a similar definition of handicapped, including voluntary conditions, would be appropriate to the PHRA. It would be an effective means to protect the investment the legislature has made in rehabilitating Pennsylvania citizens.[107] Indeed in the total scheme of providing for the disabled, Social Security maintains those who cannot work; rehabilitation programs enable them to compete for work; fair employment laws should therefore, assure that the competition for jobs is fairly conducted.

IV. Pennsylvania Human Relations Act

While consistency within the broad area of the law serving the handicapped is desirable, and principles gathered from related law

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102. *Id.* at 796.

103. Comprehensive Rehabilitation Services Amendments of 1978, Pub. L. No. 95-602, § 122, 92 Stat. 2955 (codified in 29 U.S.C.A. § 706 (7)(B) (Supp. 1980).

104. "The conference substitute clarifies that *only* those active alcoholics or drug abusers who *also* cannot perform . . . [on] the job . . . or present a danger to life or property, are not covered by the employment provisions of . . . § 504." H.R. Conf. Rep. No. 1780, 95th Cong., 2d Sess. 102, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7334, 7413.

105. PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1980).

106. The Pa. Bureau of Vocational Rehabilitation receives 80% of its funding from the federal government under the provisions of the Vocational Rehabilitation Act, 29 U.S.C. § 722 (1976).

107. Arguably the legislature has already authorized the application of the Pa. Human Relations Act to the voluntary conditions of drug and alcohol abuse. PA. STAT. ANN. tit. 71, § 1690.110 (Purdon Supp. 1980-81), states "Drug and alcohol abuse or dependence shall be regarded as a . . . physical and mental illness, disease, *disability or similar term* for the purpose of all legislation relating to health, *welfare* and rehabilitation programs, funds and other benefits." *Id.* (emphasis added). It is reasonable to see the PHRA as a welfare benefit under the obviously broad intent of this section. Thus, alcoholism and drug dependence can be regarded as disabilities under the Act.

are persuasive, only an examination of the purpose of the Pennsylvania Human Relations Act itself can determine the definition most appropriate to the Act.[108] Thus, the relevant language, legislative history, and judicial interpretation of the Act must be explored.

A. Statutory Language and Legislative History.

Section 952(b) of the Pennsylvania Human Relations Act[109] provides:

> It is hereby declared the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability . . . age, sex, or national origin.[110]

This declaration contains two separate and possibly conflicting purposes. The stated aim of the law is to utilize *all* individual capacities, yet the Act designates only specified classifications, such as race, color, and religion, as impermissible. The Act, in fact, only provides enforcement measures to protect these designated classes.[111] In effect, the PHRA enunciates a policy of utilizing the capacities of the entire workforce, but *applies* that policy only to specific groups within the workforce.

The history of the Act explains this apparent anomaly. Fair employment laws were enacted during a period of a burgeoning political movement to integrate Blacks and other racial minorities into the mainstream of American life.[112] Conscious of minority aspirations, proponents of the original PHRA legislation[113] urged its passage by citing the findings of the Governor's Commission on Industrial Race Relations that minorities were under-employed.[114] They spoke of

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108. *See* 1 PA. CON. STAT. ANN. § 1921 (Purdon 1980-81). This cannon of statutory construction reflects the central theme of the comment; that proper attribution of meaning depends on a thorough understanding of an Act's underlying social policy. *See* notes 16-30 and accompanying text *supra.*

109. PA. STAT. ANN. tit. 43, § 952(b) (Purdon Supp. 1980-81).

110. *Id.*

111. *See* PA. STAT. ANN. tit. 43, § 955(a)-(j) (Purdon Supp. 1980-81) which lists twenty-five separate categories of illegal discriminatory acts. All, however, are only illegal when done on the basis of race, color, religious creed, ancestry, sex national or handicapped/disability.

112. President Johnson's speech to Congress urging adoption of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, typifies the tenor of the times:

> Last week I addressed to the American people an appeal to conscience. A request for their cooperation in meeting the moral crisis in America race relations. I warned of a rising tide of discontent that threatens the public safety in many parts of the country. I emphasized that the events in Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently choose to ignore them. It is time to act in Congress, in State and local legislative bodies and above all, in all of our daily lives.

Special message to the Congress by the President, June 19, 1963, reprinted in 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1055 (1970).

113. Act of Oct. 27, 1955, Pa. Laws 744 (codified at PA. STAT. ANN. tit. 43, §§ 951-963 (Purdon 1964)).

114. 3 PA. LEG. J. 2827 (1955) (Remarks of Pa. State Sen. Silbert).

the bill as promoting "brotherhood"[115] and correcting "evils born in slavery.'[116]

Although the Act surely was intended to elevate the status of minorities[117] this concern alone does not explain its ultimate passage. The legislature also saw PHRA as an affirmance of fundamental American values.[118] The belief that individual effort is the main driving force behind progress is a basic tenent of American society. The arbitrary denial of "a fair opportunity and a free scope for individual effort" on the basis of unfounded, stereotypical assumptions runs completely counter to basic principles of the American system.[119]

The evil to be remedied by the Pennsylvania Human Relations Act is not simply the economic deprivation of minorities but more fundamentally, the affront arbitrary discrimination presents to society's deeply felt values of fair play and individual merit.[120] "[Fair-employment laws] reflect a rejection of any point of view of innate inferiority and also a commitment to the principle that competition for scarce opportunities[121] should be on the basis of individual

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115. 1 PA. LEG. J. 446 (1955) (Remarks of Pa. State Rep. Varallo).

116. 3 PA. LEG. J. 2825 (1955) (Remarks of Pa. State Sen. Dent).

117. 3 PA. LEG. J. 2826 (1955) (Remarks of Pa. State Sen. Holland).

118. I was motivated by what I . . . believe to be the fundamental rights of Americans and the rights contained in our Declaration of Independence and the Constitution of the United States. People of all religions and all creeds and all colors only seek the same goal. An opportunity to work and rear their families, an opportunity to give their children a little better lot in life, a roof over their heads, food sufficient to keep their bellies warm and full and a little set aside for a time in old age when they are unable to care for themselves.

3 PA. LEG. J. 2826 (1955) (Remarks of Pa. State Sen. Dent).

119. G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 211 (1944). Gunnan Myrdal's famous study of the conflict between America's self-perception as a free and classless society and the role society had relegated to Negro proved prophetic. It predicted not only the explosion of the Black political movement, but also why that movement would be successful. Myrdal understood that Americans could not passively accept the notion that a group could be denied access to society once that exclusion was seen as an unfair restraint on the individual. *Id.*

A stronger statement of the role the perception of individual merit plays in societal structure is made in M. YOUNG, THE RISE OF THE MERITOCRACY: 1870-2033 (1958), in which the author theorizes that since 1870 the rich have satisfactorily justified their position to the poor by documents (such as diplomas, degress, doctorates) showing superior individual merit. If such a theory is true, it certainly would be difficult for the rich to deny the poor a fair chance to prove their individual merit. In any case the concept of individual merit deserving a fair opportunity is not a liberal propaganist's theory, but one of the fundamental assumptions of our society.

120. Whether you be [sic] Black or White, Catholic, Protestant or Jew, or what your national ancestry may be, you will be denied the equal rights to seek employment and certainly, Mr. Speaker, that is not the American way.

1 PA. LEG. J. 433 (1955) (Remarks of Pa. State Rep. Rigby).

121. Unemployment in America has not gone below 4% since 1964, and indeed, 4% is presently considered to be an unattainable goal. Full employment is presently considered to have been obtained when the unemployment rate reaches 5.5% P. CAGAN, *The Reduction of Inflation and the Magnitude of Unemployment* in CONTEMPORARY ECONOMIC PROBLEMS (W. Fellner ed. 1977). The unemployment rate from Jan. 1977 thru May 1980 averaged 6.5%, WORLD ALMANAC 177 (1981). Under economic conditions where many individuals remain unemployed, the *allocation* of job opportunities is a crucial social issue. Fair employment laws

merit."[122]

The PHRA clearly commits Pennsylvania to the broad goal of utilizing every individual's capacities. The extent and legal effect of the commitment is, however, somewhat ambiguous. Judicial use of the policy declaration in Section 952 helps to clarify the ambiguity.

B. Judicial Interpretation

Pennsylvania courts have viewed the Pennsylvania Human Relatins Act as a "manifestation of a fundamental policy of the Commonwealth."[123] Consequently, the general policy declarations of the Act have played a significant role in construing the Act's jurisdiction.

In *Pennsylvania Human Relations Comm'n v. Chester School District,*[124] the Pennsylvania Supreme Court rejected a lower court's holding that since "the underlying inequities . . . expounded in the declaration of policy [Section 952] [did] not include *de facto* segregation *as such," de facto* segregation was not prohibited by the Act.[125] The Supreme Court stated that the "restrictive . construction placed on this section [the policy provisions of Section 952]" . . . by the lower court, "[i]gnores the legislative intention that racial discrimination, whatever the source threatens the health, safety and welfare of the Commonwealth."[126] Thus, the Court accepted PHRC jurisdiction over this class of discriminatory action by giving legal effect to the general policy provisions.

The willingness of courts to see the policy sections of the Act as requiring broad jurisdiction reached its apex in *Mars Community Boys' Baseball Association v. Pennsylvania Human Relations Commission.*[127] In that case, a girl requested relief because she had been denied access to membership in the boys' baseball league. Looking at the PHRA the court discovered that the literal statutory language *prohibited* discrimination in places of public accommodation "because of race, color, religious creed, ancestry, or national origin,"[128] but made no mention of sex discrimination. Nonetheless, despite the *complete absence* of even ambiguous language, one-half of the court held that Section 952 and other general policy declarations in the

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are a means to guarantee that jobs are allocated by criteria society, rather than the individual employer, deems to be fair.

122. Fiss, *A Theory of Fair Employment Law,* 38 U. CHI. L. REV. 235, 241 (1971).

123. Pennsylvania Human Rel. Comm'n v. Chester School Dist., 427 Pa. 157, 167, 233 A.2d 290, 295 (1967).

124. 427 Pa. 157, 233 A.2d 290 (1967).

125. *Id.* at 169, 233 A.2d at 296, citing Chester School Dist. v. Pennsylvania Human Rel. Comm'n, 85 Dauph. 18, 28, 224 A.2d 811, 822 (1966).

126. *Id.* at 170, 233 A.2d at 297.

127. __ Pa. __, 410 A.2d 1246 (1980).

128. PA. STAT. ANN. tit. 43, § 955(i) (Purdon 1964).

Act were sufficient, *by themselves,* to require a prohibition of sex discrimination be included in the public accommodations provisions.

Pennsylvania courts have also interpreted Section 952 as mandating a broad reading both of the class of discriminators reached by the Act [129] and the class of actions deemed discriminatory under the Act.[130] It, therefore, would be consistent to see the Act's strong social policy as dictating an expansive definition of the class of handicapped individuals to be protected.

V. The Handicap Provisions of the Pennsylvania Human Relations Act

A. The PHRC Definition of the Handicapped

> It shall be an unlawfully discriminatory practice, unless based upon a *bona fide* occupational qualification, . . . for any employer because of . . . the non-job related *handicaps or disability* of any individual to refuse to hire or employ, to bar or to discharge from employment . . . or to discriminate against such individual with respect to compensation, hire, tenure, conditions or privileges of employment. . . .[131]

Under the statutory procedures established by the Pennsylvania Human Relations Act, the handicap provisions are initially interpreted by the Pennsylvania Human Relations Commission.[132] The Commission has adopted *verbatim* the definition of handicapped applicable to the equal employment provisions [Section 504] of the Federal Vocational Rehabilitation Act of 1973.[133] The Courts accord "substantial weight" to the interpretations of the Act by the PHRC.[134] The specific PHRC decisions, however, regarding handi-

129. Alto-Reste Cemetery Ass'n v. Pennsylvania Human Rel. Comm'n, 453 Pa. 124, 306 A.2d 881 (1973) (non-sectarian cemetery held to be public accommodations subject to the Act's jurisdiction).

130. Pennsylvania Human Rel. Comm'n v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972) (private club's dining room was construed as a public accommodation when members invite non-members to use the facilities).

131. PA. STAT. ANN. tit. 43, § 955(a) (Purdon Supp. 1980-81). While this comment deals exclusively with the employment protection granted the handicapped, other protections are included in the Act. *See* PA. STAT. ANN. tit. 43, § 955(c) (Purdon Supp. 1980-81) protecting union membership); PA. STAT. ANN. tit. 43, § 955(f) (Purdon Supp. 1980-81) (prohibition of discrimination by employment agencies); PA. STAT. ANN. tit. 43, § 955(h) (Purdon Supp. 1980-81) (protection from housing discrimination); PA. STAT. ANN. tit. 43, § 955(i) (Purdon Supp. 1980-81) (prohibiting discrimination in places of public accommodation, including schools).

132. The Pennsylvania Human Relations Commission was established "to adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of this Act," PA. STAT. ANN. tit. 43, § 957(d) (Purdon 1964), and to "initiate, receive, investigate and pass upon complaints charging unlawful discriminatory practices," PA. STAT. ANN. tit. 43, § 957(f) (Purdon 1964). The Act requires that a complainant requesting relief from a discriminatory practice first exhaust the administrative remedies before the Commission prior to pursuing the issue in the judicial system. PA. STAT. ANN. tit. 43, § 962 (Purdon Supp. 1980-81). The Commission, through its regulations and adjudicative hearings, gives legal substance to the statutory framework.

133. 29 U.S.C. §§ 706(6) (A)-706(6)(C) (1976). *See* note 99 *supra.*

134. Because the statute intends that the Commission play an adjudicative, as well as in-

cap classifications are bound by the legislative intent.[135]

The PHRC definition of handicapped is tripartate, each section having an independent legal effect. 16 Pa. Code § 44.4(i)(A) defines handicap as "a physical or mental impairment which substantially limits a major life function."[136] Section 44.4(i)(A) is neutral, in that the judicial interpretation of "substantial limit[ation]" and "major life function" may be inclusive or restrictive.[137] 16 Pa. Code § 44.4(i)(B), on the other hand, permits retroactive application of the handicap classification. "A handicapped individual is one who has a record of such an impairment [one qualified under Section 44.4 (i)[A)]."[138] Under Section 44.4(i)(B) an individual not *presently* under any physical impairment could, nonetheless, be protected. Although the appropriateness of protecting past physical impairments may be challenged,[139] the statutory language is unequivocal. Section 955(b)(5) states: "It shall be an unlawful discriminatory practice . . . for any employer to . . . deny employment because of a prior handicap or disability."[140]

Sections 44.4(i)(A) and (B) are inherently limited in scope, since the existence of a handicap, either past or present, can be determined by ascertainable physical characteristics. 16 Pa. Code § 44.4(i)(C) is different in kind and expansive in effect. Section 44.4(i)(C) states: "A handicapped individual is one who is *regarded as* having such an impairment [that substantially limits a major life function]."[141] The

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vestigative role, the decisions and regulations of the PHRC are given "substantial weight" by the courts. *See* Brief for Respondents at 16, Philadelphia Elec. Co. v. Pennsylvania Human Rel. Comm'n. (English), No. 1033 C.D. 1980 (Pa. Commw. Ct. petition for review filed April 25, 1980), *citing* Pennsylvania Higher Education Assistance Agency v. Abington Mem. Hosp., 478 Pa. 514, 387 A.2d 440 (1978).

135. *See* Pennsylvania Human Rel. Comm'n v. St. Joe Minerals Corp., 24 Pa. Commw. Ct. 455, 357 A.2d 233 (1976).

136. 16 PA. CODE § 44.4(i)(A) (1979).

137. The Commission has, however, interpreted subsection (A) broadly:

> Physical or mental impairment means a physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following symptoms: neurological; musculoskelatal; special sense organs; respiratory including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphetic; skin and endocrine or mental or psychological disorder such as mental illness, and specific learning disabilities.

16 PA. CODE § 44.4(ii)(A) (1979). In addition, Subsection (B) provides: "Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 16 PA. CODE § 44.4 (ii)(B) (1979).

138. 16 PA. CODE § 44.4(i)(B) (1979).

139. Brief for the Petitioner at 22, Philadelphia Elec. Co. v. Pennsylvania Human Rel. Comm'n. (English), No. 1033 C.D. 1980 (Pa. Commw. Ct. petition for review filed April 25, 1980).

140. PA. STAT. ANN. tit. 43, § 955(b)(5) (Purdon Supp. 1980-81). By adopting the language the legislature is implicitly recognizing that rehabilitation of the handicapped makes no sense if the rehabilitated individual can arbitrarily be denied employment. *See* notes 95-99 and accompanying text *supra.* Nor did the legislature intend employer presumptions of future handicaps to be permissible since it declared "Uninsurability or increased cost of insurance . . . does not render a handicap or disability job related." PA. STAT. ANN. tit. 43, § 954(p) (Purdon Supp. 1980-81) (only non-job related handicaps are protected by the PHRA).

141. 16 PA. CODE § 44.4(i)(C) (1979).

protection afforded the individual regarded as handicapped is not triggered by the employee's *actual* physical characteristics, but by the employer's reaction to the physical characteristics.[142] Thus, the asthmatic or mild epileptic is protected not because his inherent condition actually impairs a life function, but because the employer *assumes* that it does.

Nonetheless, in adopting the "regarded as handicapped' provision, the PHRC is in harmony with Pennsylvania courts in construing the Act's jurisdiction broadly to effectuate its underlying policy.[143] The PHRA does not protect Blacks because of their "blackness" per se, but because employers react to blackness by discriminating against Black workers. It is no less consistent with the Act's purpose to protect individuals regarded as handicapped than it is to protect individuals regarded as Black.[144] By requiring that an employer verify an employee's incapacity, rather than merely *regarding* the employee as incapable, the PHRC definition "[f]osters employment of all individuals in accordance with their fullest capacities."[145] Fair Employment law inherently looks to the employer's reaction to an individual's characteristics, not the characteristics themselves. "The principle of non-discrimination requires that individuals be considered on the basis of individual capacity and not on the basis of any characteristics generally attributable to the group."[146]

Further support for the PHRC definition can be found in the specific provisions of the Act. Section 955(b)(1)[147] allows the employer to inquire as to "the existence and nature of a *present* handicap or disability," but also states that "to decide whether such a handicap or disability substantially interferes with the ability to perform the essential functions of the [job] . . . the employer must in-

142. Advocates for the Handicapped v. Sears, Roebuck & Co., 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), *cert. denied,* 444 U.S. 981 (1979), and Providence Journal Co. v. Mason, 116 R.I. 614, 359 A.2d 682 (1976) have adopted classifications defining the handicap class by criteria based strictly on the *actual* physical condition of the individual, thus rejecting constructions that would allow an employer's actions to determine the existence of a handicap as an over extention of the law. *See* notes 25-28, 30 and accompanying text *supra.* For analysis of the validity of the restrictive view, see notes 142-159 and accompanying text *infra.*

143. *See* notes 123-130 and accompanying text *supra.*

144. It is peculiar that the spector of over-inclusive class is raised only in the context of the handicapped. If one was regarded as being Black — treated as a Black man — thus being denied employment or housing or the right to vote, would the discriminator later be able to claim that the person was not actually Black and therefore escape liability? *See* J. GRIFFIN, BLACK LIKE ME, (1961) (account of a white man who, having darkened his skin, travelled through the segregated South).

145. PA. STAT. ANN. tit. 43, § 952(b) (Purdon Supp. 1980-81).

146. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel., 4 Pa. Commw. Ct. 448, 465, 287 A.2d 161, 170 (1972), *aff'd,* 413 U.S. 376 (1973) citing Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 236 (5th Cir. 1969).

147. 9 PA. STAT. ANN. tit. 43, § 955(b)(1) (Purdon Supp. 1980-81).

quire beyond the mere existence of a handicap."[148] Consequently, to comply with the Act, the employer is required to look beyond his *perception* of the applicant's abilities and to consider the abilities themselves. Section 955(l) indicates a legislative intent that the underlying principle of merit selection be applied to handicapped discrimination[149] as it is to sexual, racial or religious discrimination. The PHRC definition of handicapped comports with that intent.

B. The Consequences of an Inclusive Definition

While the PHRC definition apparently is consistent with the legislative intent of the Human Relations Act, it cannot stand if its practical consequences lead to an unintended result.[150] Proponents of a restrictive definition of "handicapped" contend that the practical consequences of the PHRC definition would be to unreasonably limit the right of employers to choose their employees, for "[any] person with any physical disability, no matter how slight, [would be] entitled to protection under the Fair Employment Practices Act."[151] The PHRC definition would, by such reasoning, have the unintended consequence of creating a universal anti-discrimination law. Thus, the limits of the PHRC formulation, if any, must be examined.

To be considered "handicapped" under Section 44.4(i)(A) or (B)[152] a complainant must provide medical proof to the Human Relations Commission[153] that he has, or has a record of, "an impairment that substantially limits a major life function."[154] Certainly, some conditions will fail to qualify.

Unlike limitations to Section 44.4(i)(A) and (B), which are express, the limitation of the Section 44.4(i)(C) "regarded as handicapped" class is inherent in the definition. The limitation becomes apparent in examining the order of proof in employment discrimina-

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148. *Id.*

149. PA. STAT. ANN. tit. 43, § 955(b)(5) (Purdon Supp. 1980-81), in prohibiting discrimination based on past handicaps likewise aims to prevent the *perception* of the effects of a past disability from being the decisive factor in an employment decision. PHRC regulations also give employer's perceptions legal effect in construing "has a record of impairment" as meaning "has a history or has been *misclassified* as having a mental or physical impairment that substantially limits one or more major life function." 16 PA. CODE § 44.4(ii)(C). *See* State Div. of Human Rights v. Averill Parks Cent. School Dist., 46 N.Y.2d 950, 415 N.Y.S.2d 405, 388 N.E.2d 719 (1979) (a school bus driver's termination held to be discriminatory when the school administered hearing test that incorrectly classified to the driver as deaf). The "misclassification" regulation differs from the "regarded as" handicapped regulation in that the employer's decision is based on his negligent estimation of the employee's ability to perform job functions rather than a stereotypical assumption of the employee's abilities. If the "misclassified" handicap class is appropriate for anti-discrimination law, then the "regarded as" class is appropriate as well.

150. 1 PA. CONS. STAT. ANN. § 1921(6) (Purdon 1980).

151. Providence Journal Co. v. Mason, 116 R.I. 614, 621, 359 A.2d 682 (1976).

152. 16 PA. CODE § 44.4(i)(A) & (B) (1979).

153. *See* PA. STAT. ANN. tit. 43, § 959 (Purdon 1964 & Supp. 1980-81) (outlining the procedures which must be followed to obtain relief under the PHRA).

154. 16 PA. CODE § 44.4(i) (A) (1979).

tion cases. In the landmark case of *McDonnell-Douglas v. Green,*[155] in which a Black worker was denied employment for which he was proven to be qualified, the United States Supreme Court was willing to infer solely from the fact of denial that race was the basis for the job decision. The employer, therefore, had the burden of rebutting the presumption of discriminatory intent. Under the "regarded as" handicapped definition the inference of discriminatory intent cannot be made, for if the complainant cannot prove that the physical impairment was the basis for the job decision, then he cannot claim that the employer regarded him as handicapped. The employee can only establish a prima facie case of discrimination by evidence of a causal relationship between the impairment and the adverse job decision. When the burden of going forward is on the complainant the likely result is that claims will be limited by the difficulty of making the necessary showing.[156] Trivial and unfounded claims will be unable to bear the burden.

The burden of proof analysis reveals a more basic fallacy in the restrictive approach to the handicap definition. A narrow classification assumes that the legislature intended to limit *access* to the class, rather than to limit the law's effect on employer discretion. Examination of the statutory language leads to the opposite conclusion. A non-job related handicap means "any handicap . . . which does not substantially *interfere with ability to perform* the essential functions of [employment]."[157] Thus, the legislature appears willing to extend protection to *any* handicap as long as it does not interfere with reasonable business needs. "Fair employment laws embody an attempt to reconcile two distinct and, at times, competing social interests — the interest in ending all vestiges of discrimination, and the interest in promoting an efficient and productive economy."[158] Under the scheme of the PHRA, the interest in ending discrimination against the handicapped is served by inclusive definition of the class. The interest in promoting an efficient economy is promoted by the job relatedness limitation.

Moreover, Social Security, Workmen's Compensation and Vocational Rehabilitation programs all define the disabled class primarily by the ability to work, rather than by the innate nature of the

155. 411 U.S. 792 (1973) (holding adopted in Pennsylvania in General Elec. Co. v. Pennsylvania Human Rel. Comm'n, 469 Pa. 292, 365 A.2d 649 (1976)).

156. PHRC statistics show that even with the *McDonald-Douglas* presumptions, more than 65.0% of the complaints filed in 1979 were dismissed for lack of jurisdiction, failure to show probable cause, or failure of the complainant to pursue the complaint. Pennsylvania Human Relations Commission, ANNUAL REPORT 10 (1980).

157. PA. STAT. ANN. tit. 43, § 954(p) (Purdon Supp. 1980-81).

158. General Elec. Co. v. Pennsylvania Human Rel. Comm'n, 469 Pa. 292, 303, 365 A.2d 649, 655 (1976).

disability.[159] There is no distinction of purpose between the PHRA and these other statutes that necessitates a different definition of disability under the Human Relations Act. Finally, since males as well as females and whites as well as Blacks are protected by anti-discrimination law, the mere possibility of universal access alone does not seem sufficient to justify restriction of a protected class.

The PHRC inclusive definition does not appear to place a greater burden on the employer than the legislature intended. The inherent limitations of the definition tend to minimize trivial and unfounded claims, and the job-relatedness criteria will reduce employer discretion only to the extent that discretion serves no legitimate business purpose. The net effect of the PHRC definition is not likely to create a "universal fair employment law" but merely to stimulate businessmen to more carefully tailor physical employment criteria to the job itself.

VI. Volition under an Inclusive Definition of Handicapped

In one sense, adoption of the PHRC definition would be determinative in the *English*[160] case. Philadelphia Electric's testing indicated that Joyce English was capable of performing the job, but PECO denied her the position because of her obesity. Since PECO regarded Ms. English as handicapped, she would be protected under 16 Pa. Code 44.4(i)(C). Nonetheless, the countervailing question of the voluntary nature of the condition may serve to exclude obesity from even the broadest handicap classification.

The fact that a characteristic is voluntarily chosen does not, per se exclude it from fair employment law protection. The voluntary choice of religion is expressly protected.[161] In *United Airlines v. Sprogis,*[162] litigated under the federal analog[163] of the Pennsylvania Human Relations Act, the voluntary choice to be married was protected. On the other hand, *Fagan v. National Cash Register,*[164] did not find the voluntary choice of hair length to be protected. While both characteristics were equally voluntary, the opinions are consistent because marriage is considered a fundamental value, while hair

159. *See* notes 105-107 and accompanying text *supra.*

160. English v. Philadelphia Elec. Co., No. E-12163, op. at 9-10 (Pa. Human Rel. Comm'n. March 31, 1980). The use of the Metropolitan Life tables neither considered Ms. English's personal health nor did it show her to be incapable of performing her job functions. This is not the type of merit selection indicated by the Act.

161. *See* note 34 and accompanying text *supra.*

162. 444 F.2d 1194 (7th Cir. 1971), *cert. denied,* 444 U.S. 991 (1971) (policy that required termination of married female employees, but allowed married males to continue working held discriminatory on basis of sex).

163. Civil Rights Act of 1964, tit. VII (codified at 42 U.S.C. § 2000e (1976)).

164. 481 F.2d 1115 (D.C. Cir. 1973) (policy that terminated males with long hair, but allowed females with long hair to continue working held not to be discriminatory on basis of sex).

length is not. But if fair employment law does not afford the choice of personal appearance protection, it would appear inconsistent to protect the choice of overeating, overdrinking or over-indulgening in drugs.

The answer lies in understanding the legislative intent embodied in Workmen's Compensation, Social Security or Vocational Rehabilitation statutes. These laws did not abolish the distinction between voluntary and involuntary conditions, but rather changed the *standard by which a given condition is judged to be volitional.* Adoption of medical criteria in these areas of the law implicitly reflects a societal judgment that alcoholism, drug use, and obesity should be subject to a standard of psychological dependence, not to a moral standard of undesirability. The choice of hair length is distinguishable because under either standard it is indisputably a free choice, while alcoholism, drug use, or obesity per se are not volitional under present medical criteria.

Social Security benefits and Vocational Rehabilitation programs are available to alcoholics and drug abusers who meet applicable medical standards.[165] The Pennsylvania legislature explicitly adopted a "psychological dependence" standard[166] in fashioning rehabilitation programs for drug and alcohol abuse. Federal anti-discrimination protections have been extended to alcohol and drug abusers. Courts that have considered obesity in the Social Security context have medical standards to determine volition. Under a medical standard overeating is no more volitional than overdrinking.[167] Employing a medical standard to determine the voluntary nature of alcoholism, obesity and drug abuse under the Human Relations Act would reflect the change in societal attitude toward these conditions as well as comport with essentially remedial policies of the Act.[168]

This analysis can be taken one step further. In Workmen's

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165. *See* notes 69-78, 91-95 and accompanying text *supra.*

166. *See* notes 99-104 and accompanying text *supra.*

167. Prominent nutritionist Dr. Jean Mayer points out:

> Considering obesity to be caused by 'over-eating' is like considering alcoholism to be caused by 'overdrinking' . . . it is probable that considering the complication of physiologic and phychologic mechanisms involved [that] one will find not a single cause but a multiplicity of factors leading to this caloric imbalance.

J. MAYER, OVERWEIGHT: CAUSES, COSTS AND CONTROL 3 (1968). A study conducted in Boston divided 400 obese individuals into four groups, three receiving extensive medical and phychological therapy over a period of three years. The treated individuals lost no more weight than the untreated. The vast majority in all groups remained obese. The study indicates losing weight may not be a simple matter of individual volition. J. MAYER, OBESITY: CAUSES, COST AND CONTROL 62 (1968).

168. The distinction between the moral standard and the medical standard is starkly outlined in the criminal context.

> Psychology is concerned with diagnosis and treatment, not moral judgment. * * * * [T]o the psychiatrist mental cases are a series of imperceptible gradations from mild psychosis to the extreme phychotic, where criminal law allows no gradation. It requires a final moral judgment of the culpability of the accused. . . . A complete reconciliation of the medical test and moral test of criminal responsibility is impossi-

Compensation, the societal interest in shifting the burden of work-related injuries to the employer so outweighs the interest in punishing alcoholism or obesity that the voluntary issue is completely irrelevant to employer liability.[169] Similarly, since the explicit policy of the Human Relations Act is to foster maximum utilization of "all individuals in accordance with their fullest capabilities,"[170] considerations of the voluntariness in a condition are irrelevant. A closer look at the *Fagan* decision shows that firing the long-haired males was affirmed not because of voluntariness, but because the court found that the long hair detracted from the individual's appearance in a way that made him *unable to perform the job functions.*[171] The exception to the handicapped class should be drawn on the basis of job-relatedness, not on voluntariness.

VII. Conclusion

The inclusion of voluntary conditions within the handicapped classification of the Pennsylvania Human Relations Act is ultimately a question of *access* to the Act's protections, not a guarantee of employment. The policy of fostering the use of individual capacities that permeates the PHRA's language, history and judicial construction indicates a legislative intent that the access be broad. The treatment of obesity, alcoholism, and drug abuse as handicaps in related areas of the law indicates that the arguably voluntary nature of these conditions is insufficient, standing alone, to justify exclusion from the Act. In drafting the PHRA the legislature defined the handicapped class solely by job-related criteria. Analysis does not disturb their wisdom.

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ble, the purposes are different, the assumptions behind the two standards are different.

United States v. Holloway, 148 F.2d 665, 666 (D.C. Cir. 1945), *cert. denied,* 344 U.S. 852 (1945). *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (discussing at length the continuing difficulty in reconciling medical opinion from moral judgment where an insanity defense is offered to a criminal charge).

The fact that Social Security, Workmen's Compensation and Rehabilitation law equate the medical and moral standard implies that outside the criminal context, the policy of encouraging conformance with societal norms can be satisfied by medical treatment alone.

169. *See* notes 43-59 and accompanying text *supra.*

170. PA. STAT. ANN. tit. 43, § 952(b) (Purdon 1964).

171. Fagan v. National Cash Register, 481 F.2d 1115, 1121 (D.C. Cir. 1973).